Supreme Court, U.S.
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Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Petitioner,

v.

ALBUQUERQUE COMMONS PARTNERSHIP,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) When a local government seeks to rezone property, does ordinary legislative process violate the Due Process Clause of the 14th Amendment, and must the local government instead provide a quasi-judicial hearing, in which "*ex parte* communications" between legislators and constituents are prohibited?

(2) May the owner of rezoned property assert a procedural due process claim for damages under 42 U.S.C. § 1983 without pursuing the remedies available under state law?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The City Council of the City of Albuquerque, New Mexico ("the City") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-44a) is reported at 146 N.M. 568, 212 P.3d 1122. The order of the New Mexico Supreme Court denying review of that opinion (App. 153a-154a) is noted at 146 N.M. 733, 215 P.3d 42. The prior opinion of the New Mexico Supreme Court reversing an earlier court of appeals decision and remanding the case to that court (App. 45a-81a) is reported at 144 N.M. 99, 184 P.3d 411. The prior opinion of the court of appeals (App. 82a-139a) is reported at 140 N.M. 751, 149 P.3d 67. The rulings of the New Mexico Second Judicial District Court (App. 140a-152a) are unreported.

JURISDICTION

The court of appeals entered judgment on May 7, 2009. App. 1a. A timely petition for writ of certiorari to the New Mexico Supreme Court was denied on June 22, 2009. App. 153a. On September 14, 2009, Justice Sotomayor granted Petitioner's application, No. 09A255, for an extension of time to file a petition for writ of certiorari from September 20, 2009, to November 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Deepening two conflicts among the lower courts, the New Mexico Court of Appeals held that ordinary

legislative process in zoning cases can violate the Due Process Clause of the 14th Amendment. Affirming an $8,349,095.00 judgment, the court determined that the City of Albuquerque violated the right of Respondent, Albuquerque Commons Partnership ("ACP"), to procedural due process by rezoning ACP's property, along with other parcels, by means of a legislative action. The court held that the City was required to provide a "quasi-judicial hearing," in which "*ex parte* communications" between legislators and constituents are prohibited. In addition, the court permitted ACP to seek relief as to that violation under 42 U.S.C. § 1983, even though ACP had rejected available state law remedies.

The court acknowledged that its decision directly conflicts with a holding from the Seventh Circuit that "minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983." App. 27a (¶ 43). The decision also conflicts with the holdings of several other state and federal courts. Because of these conflicts and because the court of appeals' decision raises a fundamental and recurring issue regarding the authority of local governments to regulate the use of property within their jurisdiction by legislative action, this Court should grant certiorari.

I. FACTUAL BACKGROUND

1. Petitioner, the City Council of the City of Albuquerque, New Mexico, has authority to enact zoning laws governing property use within the city. Respondent ACP, from 1984 to 1999, held a long-term leasehold interest in a 28-acre parcel in an area known as the Uptown Sector. App. 46a-47a (¶ 4); *id.* at 83a-84a (¶ 4).

When ACP first leased the property, it was zoned under the City's "1981 Uptown Sector Plan," which established zoning regulations for an urban center. App. 47a (¶ 4). The 1981 Plan "did not mandate minimum development densities, mixed uses, or parking structures," *id.*, although it did impose other restrictions, *id.* at 85a (¶ 6) (providing for "pedestrian-friendly landscaping, open space, and building orientation within the center of the Uptown Sector").

2. In 1991, ACP contracted to sell its leasehold to Opus Southwest Corporation ("Opus"), contingent upon Opus's obtaining approval from the City of its plan to develop the site. App. 48a (¶ 6). In August 1994, Opus submitted to the City a proposal to build a stand-alone "big box" retail project, or megastore, on the property. *Id.* at 86a (¶ 9). There was substantial public opposition to the proposed plan, causing Opus voluntarily to withdraw its proposal. *Id.* at 48a (¶ 6). A few months later, however, Opus submitted a second site plan to the City, proposing another, but somewhat smaller, "big box" retail project. *Id.* (¶ 8).

Before the City took action on Opus's proposal, the City's Planning Department suggested revisions to the Uptown Sector Plan. In particular, the proposed revisions split the commercial zone of that Sector into two new sub-zones: the "Intense Core" and the "Outside of Intense Core." App. 49a (¶ 10). New regulations were applied to the Intense Core that "prohibited free-standing retail, imposed limitations on the size of retail buildings, and required mixed uses, with retail comprising no more than 10 percent of space built on a site." *Id.*

These regulations were intended to create "a true urban center" for the City. App. 89a-90a (¶ 15). All of ACP's property was located in the Intense Core, as

was land held by two other property owners. *Id.* at 50a (¶ 11).

3. In 1995, a series of public hearings on the proposed revisions to the existing Uptown Sector Plan were held before the City's Environmental Planning Commission, the Land Use Planning and Zoning Committee, and the full City Council. App. 50a-52a (¶¶ 12-14); *id.* at 90a-93a (¶¶ 17-24). Both supporters and opponents of the proposed Plan — including ACP and Opus — testified. *Id.* at 50a-52a (¶¶ 12-14); *id.* at 90a-93a (¶¶ 17-24). During the course of the hearings, various City Council members proposed amendments to the plan that were "the result of negotiation among councilors, their constituents in the neighborhoods surrounding the Uptown Sector, and Uptown Sector businesses"; all amendments were circulated for public review. *Id.* at 93a (¶ 23). After adoption of several amendments and "extensive argument both for and against the plan," the City Council voted 7-0 in favor of it. *Id.* (¶ 24). The City Council "found that Uptown, as an urban center, affects the entire City and that Uptown's land use, transportation, and development have an impact on the safety and air quality of the entire metropolitan area." *Id.*

Opus's proposed site plan did not comply with the new zoning requirements. App. 52a (¶ 14). The New Mexico Supreme Court later found that Opus's site plan would have been permissible under the older requirements. *Id.* at 70a-71a (¶¶ 41-42).

II. PROCEEDINGS BELOW

1. ACP sought review in state district court of the City's decision to adopt the new 1995 Uptown Sector Plan. ACP asserted a claim for damages under 42 U.S.C. § 1983 and a claim that enactment of the 1995

Uptown Sector Plan was an unconstitutional taking in violation of the Fifth Amendment of the U.S. Constitution.[1] App. 52a (¶ 15). ACP's § 1983 claim also rested on allegations that the City, in adopting the new Plan, had denied ACP's federal constitutional rights to substantive and procedural due process. *Id.*

The district court ruled that ACP should have been provided with a quasi-judicial hearing, and invalidated the new Plan as to ACP. The court then permitted ACP's § 1983 damages claim, as well as its federal takings claim, to go forward. The court, however, dismissed ACP's substantive due process claim, ruling that the City's adoption of the Plan furthered a legitimate governmental interest and was not arbitrary and capricious. App. 52a (¶ 15).

ACP's federal procedural due process and takings claims were tried to a jury, which returned a verdict for ACP on both claims. App. 53a (¶ 18). After dismissing the jury's award of damages on the takings claim pursuant to the election-of-remedies doctrine, the district court entered judgment for ACP in the amount of $8,349,095.00. *Id.*

2. The New Mexico Court of Appeals reversed. That court found that the City's action in adopting

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[1] ACP also sought injunctive relief pursuant to state law. App. 52a (¶ 15). Although the district court found that the City had violated state law requirements in adopting the 1995 Uptown Sector Plan and ordered the City to consider Opus's proposed site plan under the 1981 Plan, these claims were later declared moot when the owner of ACP's property sold it and the new owner was permitted to develop the property. *Id.* at 52a-53a, 76a (¶¶ 15-17, 54). ACP also raised a state law inverse condemnation claim; that claim was dismissed in the district court, and ACP did not further pursue it. *Id.* at 52a-54a (¶¶ 15-20).

the 1995 Uptown Sector Plan had been a valid "legislative action establishing areawide policy for the future development of the Uptown Sector." App. 131a (¶ 78). According to the court of appeals, the City's decision applied generally across multiple properties in the Intense Core, and applied prospectively — hallmarks of legislative action. *Id.* at 99a-102a (¶¶ 37-39). The fact that Opus's proposed site plan had spurred the City to implement the 1995 Plan was "not determinative." *Id.* at 101a (¶ 39). A "quasi-judicial process" providing notice and a hearing before a neutral tribunal was not required. *Id.* at 101a-102a (¶ 39). Accordingly, because the basis of the jury's verdict was that the "downzoning" (or rezoning to a more restrictive use) of ACP's property "without a quasi-judicial hearing ... resulted in multiple violations of the United States Constitution," the appellate court reversed the verdict. *Id.* at 131a (¶ 78).

3. The New Mexico Supreme Court reversed again. That court rejected the view of the appellate court that the City's action was properly legislative: "When a zoning action is *specifically designed* to affect a relatively small number of properties *and* does not apply to similarly situated properties in the surrounding area or city-wide, that action is quasi-judicial, not legislative." App. 69a (¶ 39). According to the State Supreme Court, "given that the restrictions were limited to three parcels comprising only six percent of the Uptown sector," the City's action "was the type of zoning action that New Mexico courts, as well as courts from other jurisdictions, have traditionally viewed as quasi-judicial in nature primarily because of the disparate impact on only a small number of landowners." *Id.* at 69a-70a, 71a-72a (¶¶ 40, 43). Because the City had

failed to show that the adoption of the 1995 Uptown Sector Plan amendments was legislative in nature, the court held "that the City's decision lacked procedural fairness" and did not comport with federal due process requirements. *Id.* at 76a (¶ 52). The court remanded to the court of appeals to determine whether ACP had a protected property interest and whether it was entitled to damages under § 1983. *Id.* at 79a (¶ 56).

On remand, the court of appeals examined ACP's federal due process claim according to the three-part test set forth by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). App. 18a-19a (¶ 29). The court first held that ACP had a right, under state law, to continued zoning under the earlier zoning provisions. *Id.* at 7a (¶ 10). The court further determined that ACP's property interest in continued zoning was federally cognizable. *Id.* at 7a-8a (¶¶ 11-12) (citing *Hyde Park Co.* v. *Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000)).

Turning to the questions that are the subject of this petition, the court concluded that the process provided in the City's zoning decision did not satisfy federal constitutional requirements. App. 19a (¶ 31). Specifically, because the City had proceeded legislatively, it had imposed no limitations on "*ex parte*" contacts between voting City Council members and constituents. *Id.* at 20a-21a (¶ 32) (noting that, "[p]rior to the adoption of the 1995 [Uptown Sector Plan], a non-counselor contacted a counselor — outside of the hearings — and 'encouraged' her not to propose amendments to the 1995 [Uptown Sector Plan] that would have allowed ACP to proceed with its project"). "Such contacts and influence are common and appropriate in the normal legislative functioning of a city council." *Id.* at 67a (¶ 36 n.3).

But, the court of appeals determined, such contacts are inappropriate in this zoning context because a quasi-judicial process is required by the U.S. Constitution. *Id.* at 20a-21a (¶ 32); see also *id.* at 67a (¶ 37).

Finally, the court ruled that there would have been "no added burden on the City to provide a meaningful opportunity to be heard before an impartial tribunal." App. 21a (¶ 33). Taking all of the factors together, the court "conclude[d] that the balance weighs in favor of providing a property owner with an impartial tribunal — one free from *ex parte* contacts — prior to implementing a piecemeal downzone." *Id.*

Having found a procedural due process violation, the court of appeals considered whether ACP had been required to seek relief pursuant to state law before turning to § 1983. The court first found that the federal Constitution required the City to provide pre-deprivation process, not post-deprivation relief: "[T]he City ... has broad authority to make zoning decisions that can lead to deprivations of constitutionally protected property rights. Part and parcel with that authority is the duty to provide adequate predeprivation procedural protections." App. 25a (¶ 40). The court "recognize[d] that other courts have concluded that minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983." *Id.* at 27a (¶ 43) (citing *River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994)). Still, the court found that "[d]ue process requires notice of the pending deprivation and a meaningful opportunity to be heard." *Id.* Moreover, ACP was "under no obligation to seek condemnation and

compensation before recovering damages for the due process violation." *Id.* at 30a (¶ 46).

The court of appeals thus reinstated the jury award of $8,349,095.00 on ACP's due process claim. Having so held, the court found it unnecessary to address ACP's claim that the rezoning action constituted a taking without just compensation. App. 4a (¶ 4).

REASONS FOR GRANTING THE PETITION

The decision below deepens a conflict among both state courts and the lower federal courts over the scope of process that is due when local governments engage in zoning actions. Numerous state and federal courts have ruled that zoning actions are by their nature legislative, and are thus not subject to requirements normally applied to judicial or quasi-judicial process, such as a neutral tribunal that is insulated from the *ex parte* contacts between legislators and constituents that are typical for the legislative process. Even when zoning actions affect only a single or small number of property owners, such as when a property owner seeks a variance from applicable zoning regulations, there is a substantial split of authority as to whether ordinary legislative process is sufficient under the Due Process Clause of the 14th Amendment.

These inconsistent rulings cast a cloud over the means that local governments may use to exercise the quintessential state activity of regulation of property use in the public interest. Moreover, the ruling of the court of appeals creates uncertainty as to whether a state is permitted the opportunity first to remedy any procedural violation in its regulation of property use by means of state law, or whether a state is instead immediately exposed to liability pursuant to a § 1983 claim regardless of the availability of state law

remedies. Review by this Court is necessary to address these questions, both of which have divided the lower courts.

I. THE STATE COURT'S DECISION THAT USING A LEGISLATIVE PROCESS TO EFFECT A ZONING CHANGE VIOLATES DUE PROCESS DEEPENS A SPLIT AMONG STATE AND FEDERAL COURTS.

The New Mexico Supreme Court held that the Due Process Clause of the 14th Amendment barred the City from rezoning ACP's property without first providing a quasi-judicial proceeding that is free from the *ex parte* communications that are typical in the legislative process. App. 64a, 71a-72a, 76a (¶¶ 33, 43, 52); see also *id.* at 18a-21a (¶¶ 29-33). In other words, the court held that the City could not, consistent with constitutional requirements, rezone the Intense Core of Albuquerque's Uptown Sector by means of standard legislative process. The court of appeals further held that a local government's failure to provide a quasi-judicial process presents an immediately cognizable claim under § 1983. *Id.* at 29a-30a (¶ 46). In so ruling, the court conceded that "other courts have concluded that minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983." *Id.* at 27a (¶ 43).

As the court of appeals recognized, state and federal courts widely hold that a legislative process is sufficient to satisfy federal constitutional requirements for rezoning. In *LC&S, Inc.* v. *Warren County Area Plan Commission*, 244 F.3d 601 (7th Cir. 2001), the Seventh Circuit held that "no notice or opportunity to be heard was constitutionally required" when the council of a small town amended its zoning

ordinance to require that the use of property within the town for a "tavern" would require special permission. *Id.* at 603, 605. Notably, because the new provision was solely prospective, the court found it constitutionally valid even though it was "plain" that the plaintiffs were "the only target" of the rezoning. *Id.* at 604-05; see also, *e.g.*, *River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (holding, when defendant city thwarted plaintiff from making allowable use of property, "the procedures 'due' in zoning cases are minimal," and "[c]ities may elect to make zoning decisions through the political process ... with no hearings of any kind").

Other courts have reached the same conclusion. *Jackson Court Condos., Inc.* v. *City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989) ("[W]here a zoning decision has been made by an elected body such as a City Council, we have characterized the action as legislative or 'quasi-legislative' negating procedural due process claims"); *O'Neill* v. *Town of Nantucket*, 711 F.2d 469, 471 (1st Cir. 1983) ("a zoning or quasi-zoning question does not constitutionally require anything like a judicial hearing"); *Rogin* v. *Bensalem Twp.*, 616 F.2d 680, 693 & n.60 (3d Cir. 1980) (property owner whose land was rezoned had no federal constitutional right to "procedural due process — including hearings, opportunity for confrontation and response, clear standards, an impartial arbiter"); *Hume* v. *Franklin County Fiscal Court* 276 S.W.3d 748, 752 (Ky. 2008) ("As rezoning is a legislative function, judicial concepts, like an impartial tribunal and prohibitions of *ex parte* contacts with the decision makers, do not apply."); *Wait* v. *City of Scottsdale*, 618 P.2d 601, 602 (Ariz. 1980) (rejecting contention that "judicial due

process standards should have been applied" in zoning decision).

Nor is the decision below immunized by the finding of the New Mexico Supreme Court that the zoning action at issue here "had a disparate impact on only a small number of landowners." App. 72a (¶ 43). As explained below, although some courts, like the New Mexico Supreme Court, find zoning actions that apply to a limited number of property owners to be "quasi-judicial" and thus subject to enhanced due process requirements,[2] others have made clear that all zoning actions — whether they affect many landowners or few — may properly be undertaken with no more than an ordinary legislative process. A substantial split of authority exists as to whether enhanced due process requirements exist for zoning actions that focus on a single property parcel or small group of parcels — either by "spot zoning" in a limited area or by reviewing a landowner's application for rezoning or for an exception from zoning requirements.

The approach taken by the New Mexico Supreme Court finds support in the decisions of the courts of last resort in both Kansas and Idaho. In *McPherson Landfill, Inc.* v. *Board of County Commissioners*, 49

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[2] Some states require quasi-judicial process for zoning proceedings as a matter of state law. See, *e.g.*, *Fasano* v. *Board of County Comm'rs*, 507 P.2d 23, 26-28 (Or. 1973) (holding, without reference to federal Due Process Clause, that zoning decision by County Commissioners was a judicial act subject to requirements for judicial acts), *superseded on other grounds as stated in Menges v. Board of County Comm'rs*, 606 P.2d 681 (Or. 1980). States are, of course, entitled to require process in addition to the minimum set by the 14th Amendment. The State Supreme Court here, however, held that the 14th Amendment mandates that all states provide quasi-judicial process in zoning decisions like this one.

P.3d 522 (Kan. 2002), the Supreme Court of Kansas held that when a zoning decision has limited application, federal due process requires notice and a hearing by a neutral tribunal that does not engage in *ex parte* communications.

> [W]here the focus of the zoning authority shifts from the entire city or county to one specific tract of land for which a zoning change is urged, the function of the zoning authority becomes more quasi-judicial in nature than legislative. In such quasi-judicial proceedings, it is incumbent upon the authority to comply with the requirements of due process in its proceedings. Thus, the proceedings must be fair, open, and impartial.

Id. at 524. See also *id.* at 531-34 (reviewing under federal Due Process Clause actions of defendant Board of County Commissioners for improper bias and *ex parte* contacts). Likewise, in *Eacret* v. *Bonner County*, 86 P.3d 494 (Idaho 2004), the Idaho Supreme Court ruled invalid the defendant county's decision to grant a single property owner a variance from zoning requirements on the ground that one of the reviewing zoning commissioners' "comments and *ex parte* contacts regarding the subject variance violated the due process rights" of the interested parties under the 14th Amendment. *Id.* at 498, 501.

Some federal courts of appeals also have held that the Due Process Clause requires enhanced, or quasi-judicial, process when a zoning action affects a limited number of property owners. In *Nasierowski Brothers Investment Co.* v. *City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), the Sixth Circuit held that the defendant city's rezoning of a small group of property parcels triggered enhanced federal due process requirements because that rezoning had a significant impact only on the plaintiff. *Id.* at 896-97.

"Although the rezoned strip of land encompassed approximately fifteen separate parcels," the rezoning action "was patently calculated to inflict a disproportionately detrimental injury upon only one landowner." *Id.* at 896 (emphasis omitted). Accordingly, "[t]he City's failure to afford [plaintiff] an opportunity to be heard constituted a denial of procedural due process." *Id.* at 896-97. Likewise, in *Harris* v. *County of Riverside*, 904 F.2d 497 (9th Cir. 1990), the court invalidated an ordinance in which the defendant County rezoned parcels owned by plaintiff and an adjacent landowner from commercial to residential use. *Id.* at 504. The court found that the County's "published general notice" of the proposed rezoning was "constitutionally insufficient," because the plaintiff "was entitled to individual notice of the County's plan to rezone his property." *Id.* This was so because the "change 'exceptionally affected' [plaintiff] 'on an individual basis' by severely altering the permissible uses of [his] land." *Id.* at 502.

These decisions, however, like that of the New Mexico Supreme Court, directly conflict with the holdings of several other courts that zoning actions that substantially affect only one or a small number of property owners are still legislative acts that do not give rise to enhanced due process requirements.

For example, the Seventh Circuit in *River Park* rejected a claim under § 1983 that the defendant city's failure to provide a hearing of any kind as to the plaintiff's request for a variance violated federal due process requirements. 23 F.3d at 165-66. According to the Court: "[T]he procedures 'due' in zoning cases are minimal. Cities may elect to make zoning decisions through the political process ... with no hearings of any kind." *Id.* at 166. Similarly, the Tenth Circuit rejected a procedural due process

challenge to city officials' denial of building permits under § 1983, because "[i]n land use proceedings, parties are simply not entitled to '"anything like a judicial hearing"' with all its adversarial trappings." *Landmark Land Co. of Okla.* v. *Buchanan*, 874 F.2d 717, 724 (10th Cir. 1989) (quoting *Chongris* v. *Board of Appeals*, 811 F.2d 36, 41 (1st Cir. 1987)), *held abrogated on other grounds in Federal Lands Legal Consortium ex rel. Robart Estate* v. *United States*, 195 F.3d 1190, 1195 (10th Cir. 1999). See also *Cloutier* v. *Town of Epping*, 714 F.2d 1184, 1191 (1st Cir. 1983) (rejecting procedural due process claim even though no hearing was given before permit revocation; stating "[f]ull judicial-type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits").

Along the same lines, the California Supreme Court held that "the enactment of a measure which zones or rezones property is a legislative act," and that this principle is subject to "no distinctions based on the size of the area or the number of owners." *Arnel Dev. Co.* v. *City of Costa Mesa*, 620 P.2d 565, 568 (Cal. 1980). That court specifically rejected plaintiff's claim that the federal Constitution mandated that a rezoning of three parcels of property be undertaken according to judicial, rather than legislative, procedures in light of its differential impact. *Id.* at 570-71. The same result was reached in *Emmett McLaughlin Realty, Inc.* v. *Pima County*, 132 P.3d 290 (Ariz. Ct. App. 2006). There, the Arizona Court of Appeals found:

> The passage of a zoning ordinance is the exercise of a legislative function and, thus, is generally not subject to full constitutional due process requirements, including personal notice. This so-

> called legislative act doctrine applies not only to the passage of an original zoning ordinance but also to all zoning ordinances passed by a board of supervisors, including those resolving applications for rezoning a particular piece of property.

Id. at 294-95 (citations omitted).

This Court, too, has suggested that the application of zoning rules to a single piece of property need not be determined by judicial procedures. In *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), this Court upheld as constitutionally permissible the defendant city's procedure of approving only those zoning changes that were ratified by a 55% vote of the towns' citizens in a referendum. *Id.* at 670-71. The Court found that zoning decisions reached by referendum were subject to constitutional challenge after-the-fact if "the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power," but that the procedure was not itself constitutionally impermissible. *Id.* at 676-77. Although the Court did not expressly address whether the Due Process Clause imposed the procedural requirements identified by the New Mexico Court of Appeals here, Justice Stevens did so in dissent: "[I]t is elementary that the decision-maker must be impartial and qualified to understand and to apply the controlling rules." *Id.* at 692-93 (Stevens, J., dissenting). That view, however, did not persuade a majority of the Court.

In short, the fundamental question whether the Due Process Clause permits local governments to impose zoning changes — even zoning changes that apply only to one or a few property owners — by means of a legislative process has divided state and federal courts. While the court of appeals found that a City Council member's "*ex parte* communication"

with a member of the public violates Due Process, other courts have correctly concluded that inquiries into *ex parte* contacts, which are customary in the legislative process, have no place in the review of zoning acts. See, *e.g.*, *LC&S*, 244 F.3d at 602 ("'Legislative due process' seems almost an oxymoron."). The deepening conflict is of particular moment because "regulation of land use is perhaps the quintessential state activity." *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982). Whether the Constitution permits a local government to proceed with this "quintessential state activity" by legislative action, or rather mandates a quasi-judicial process in which *ex parte* contacts between legislators and constituents are prohibited, should not turn on geography. The need for this Court to clarify the applicable constitutional requirements is manifest.

Moreover, this case presents an ideal vehicle in which to resolve the conflict over what due process requires when legislatures adopt zoning changes. Because ACP brought its due process claim under § 1983, there can be no dispute that the holding of the court of appeals rested on federal, not state, law. And because ACP's substantive due process claim was dismissed by the district court and not presented to the court of appeals, it is clear that the sole basis for the court's holding was what *procedures* are due to ACP, not the overall reasonableness of the City's determination.

II. THE DECISION THAT A PROPERTY OWNER NEED NOT PURSUE STATE LAW REMEDIES BEFORE PROCEEDING UNDER SECTION 1983 CONFLICTS WITH A DECISION OF THIS COURT AND DEEPENS A CONFLICT AMONG THE LOWER COURTS.

The decision of the court of appeals further merits this Court's review because it is inconsistent with the holding of this Court in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In *Williamson*, the Court held that a claim under § 1983 "that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186-87. The Court grounded its holding in the Just Compensation Clause of the Fifth Amendment:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.

Id. at 194 (citation and internal quotation marks omitted).

Following from the principle set forth in *Williamson* is the corollary that the Constitution does not require a state to provide pre-deprivation process for property zoning actions that do not rise to the

level of a taking. This Court has stated that for purposes of procedural due process claims:

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon v. *Burch*, 494 U.S. 113, 126 (1990). Because, as *Williamson* makes clear, the Constitution permits a state to take a citizen's property outright and provide due process afterward, the Constitution cannot simultaneously expose the state to damages under § 1983 for the failure to provide pre-deprivation process when the incursion into the property interest is *less* extensive than a complete taking. As the Seventh Circuit has explained:

> There is a reason why such scant process is all that is 'due' in zoning cases: so far as the Constitution is concerned, state and local governments are not required to respect property owners' rights, and there is therefore no obligation to provide hearings to ascertain a protected core. State and local governments may regulate and even take property; they must pay for what they take but are free to use the land as they please.

River Park, 23 F.3d at 167 (emphasis omitted).

Here, however, the New Mexico Court of Appeals ordered the City to pay $8.3 million in damages on ACP's § 1983 claim that its right to pre-deprivation process had been violated, even though ACP rejected state law remedies to correct the procedural violation, such as a remand to the City for a quasi-judicial

proceeding, and even though ACP's procedural due process and takings claims are both based upon the same government action and the same piece of property. The court concluded that the injury to ACP's due process rights was not the potential loss of the value of its property in the Uptown Sector, but instead its "loss of opportunity to meaningfully participate in a hearing related to the adoption of the 1995 [Uptown Sector Plan]." App. 29a (¶ 46). Process, however, "is not an end in itself." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). Rather, "[i]ts constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* Whatever process was due to ACP was not to ensure its "opportunity to meaningfully participate," but instead its opportunity to retain the rightful value of its property. The reasoning of the court of appeals cannot be reconciled with the state's authority, as explained in *Williamson*, to take the full value of ACP's property subject to post-deprivation process according to state law.

Consistent with *Williamson*, the Seventh and Eighth Circuits have held that plaintiffs challenging zoning decisions under the Due Process Clause — like the Takings Clause — must pursue state law remedies. See *Cormack* v. *Settle-Beshears*, 474 F.3d 528, 532 (8th Cir. 2007) ("Because Cormack has not shown that Arkansas lacks an adequate postdeprivation mechanism to provide him with just compensation for the alleged taking, his due process claim must fail."); *Wax 'N Works* v. *City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) ("Under federal law, a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states a claim under § 1983."); *River Park*,

23 F.3d at 167 ("[A] property owner may not avoid *Williamson* by applying the label 'substantive due process' to the claim. So too with the label 'procedural due process.' Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court.") (citation omitted). See also *McKinney* v. *Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc) (holding, outside of takings context, that "the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise").[3]

By contrast, the Sixth Circuit has stated that "a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency." *Nasierowski Bros.*, 949 F.2d at 89; see also *Bigelow* v. *Michigan Dep't of Natural Res.*, 970 F.2d 154, 160 (6th Cir. 1992) (reading *Nasierowski* to stand for the proposition that "the final decision rule does not apply when the denial of procedural due process itself creates an injury"). Similarly, the Ninth Circuit permitted a procedural due process challenge to a zoning decision without regard to the claimant's pursuit of state remedies:

> Even if the County has not made a final and authoritative determination of the development

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[3] This requirement to pursue state law remedies does not, of course, come from § 1983, *see Patsy* v. *Board of Regents*, 457 U.S. 496, 516 (1982) (holding that the statute does not require exhaustion of state administrative remedies), but from the Due Process Clause; only if the state procedures are deficient can there be a violation of procedural due process.

> allowed on Harris' property, he has been deprived of the commercial use of his land and must pay $2,400 to $3,000 to either regain that use, or prompt the County to make a final determination of how he can use the land.

Harris, 904 F.2d at 501. And, the Tenth Circuit permits procedural due process challenges to zoning decisions without resort to state proceedings if the due process claim is based on a property interest that can be characterized as separate from the claimant's real property interest that gives rise to a takings claim. See *Landmark Land Co.*, 874 F.2d at 723 (permitting due process challenge to proceed, although takings claim failed, on the theory that plaintiff "had a property interest in ... specific permits," such that defendant "could not withhold them without affording Landmark due process"); see also *Rocky Mountain Materials & Asphalt, Inc.* v. *Board of County Comm'rs*, 972 F.2d 309, 311 (10th Cir. 1992) .

Thus, in this regard, too, the decision of the New Mexico Court of Appeals deepens a split among the lower courts. Consistent with *Williamson*, the Seventh and Eighth Circuits require resort to state law remedies. The Sixth, Ninth, and Tenth Circuits, however, have reached contrary conclusions. This case presents this Court the opportunity to establish that the reasoning of *Williamson* extends equally to bar § 1983 claims challenging zoning proceedings under the Due Process Clause until state law remedies are pursued.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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